**DEFICIENT COUNSEL**

**Maryland v. Kulbicki, 577 U.S. --- (2015)**
**Decided October 5, 2015**

**FACTS:** On 1993, Kulbicki shot his 22 year old girlfriend in the head, killing her, over a dispute related to a paternity suit. In 1995, at his criminal trial, Agent Poole (FBI), testified about the Comparative Bullet Lead Analysis (CBLA), as the CBLA experts had been doing for decades. Specifically, he testified that the "composition of elements in the molten lead of a bullet fragment found in Kulbicki's truck matched the composition of lead in a bullet fragment removed from the victim's brain," to the degree of certainty expected in the analysis. (It was not exact, but "similar enough" to find it likely that it came from the same package.) Ultimately, Kulbicki was convicted.

Kulbicki appealed and his case lingered in state court until 2006, when he added a claim that his defense attorneys were deficient in that they did not question "the legitimacy of the CBLA.) By that time, the "CBLA had fallen out of favor," and when Maryland "held for the first time that CBLA evidence was not generally accepted by the scientific community and was therefore inadmissible." Ultimately the Maryland high court vacated his conviction based on the CBLA issue, finding that his counsel was deficient for failing to challenge the use of the CBLA at trial.

Specifically, the court stated that his attorney "should have found a report coauthored by Agent Peele in 1991 that 'presaged the flaws in CBLA evidence.'" The information in the report suggested that sometimes the composition of bullets in separate boxes of ammunition, manufactured months apart, was the same. In fact, ultimately, that apparently led the courts to reject such evidence many years later. The Court noted that "any good attorney" should have spotted the flaw in the scientific method discussed in the report.

Maryland requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is it proper to expect defense counsel to be prescient and anticipate challenges to scientific evidence in the future?

**HOLDING:** No

**DISCUSSION:** The Court noted that in 1995, "the validity of the CBLA was widely accepted, and courts regularly admitted CBLA evidence until 2003." Under the contemporary assessment rule, the Court agreed it was not proper to speculate on whether a different trial strategy would have been more successful in the trial. The Court noted that even the 1991 report "did not question the validity of CBLA, concluding that it was a valid and useful forensic tool to match suspect to victim." In fact, the Court stated, there was no reason to believe that even the most diligent counsel would have even uncovered the report. In 1995, at the time of the trial, the World Wide Web was still in its earliest stages. The report, disseminated by the Government Printing Office to various public libraries in 1994, did not indicate to which libraries

it was sent, "and in an era of card catalogues, not a worldwide web, what efforts would counsel have had to expend to find the compilation?"[1] And even had it been located, would counsel have been able to comb through it and find the potential flaw, which was apparently only a brief mention in a much larger report, which ultimately concluded that the process was valid?

The Court continued:

> Given the uncontroversial nature of CBLA at the time of Kulbicki's trial, the effect of the judgment below is to demand that lawyers go "looking for a needle in a haystack," even when they have "reason to doubt there is any needle there."[2]

The Court agreed that "reasonable competence," not "perfect advocacy," was what the right to counsel guarantees, and all that it guarantees.[3] The Court concluded that Kulbicki's attorney did not provide deficient counsel when they failed to uncover the report and use it against Peele during his testimony. The decision of Maryland's highest court was reversed.

**FULL TEXT OF OPINION:** http://www.supremecourt.gov/opinions/15pdf/14-848_pok0.pdf.

[1] Presumably it was sent to the public libraries that serve as Federal Depository Libraries throughout the U.S.
[2] Rompilla v. Beard, 545 U. S. 374 (2005).

[3] Yarborough v. Gentry, 540 U. S. 1 (2003) (per curiam).